Supreme Court, U. S.
FILED
JUN 28 1976
MICHAEL RODAK, JR., CLERK

No. 75-1567

In the Supreme Court of the United States

OCTOBER TERM, 1975

BERNARD A. HORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. A 1a-10a) is reported at 526 F.2d 884.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1976 (Pet. App. A 1a), and a petition for rehearing was denied on March 8, 1976 (Pet. App. E 26a). The petition for a writ of certiorari was filed on April 27, 1976 and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's jury selection plan violated the Jury Selection and Service Act of 1968, 28 U.S.C.

1861, *et seq.*, or petitioner's Sixth Amendment rights by excusing from jury service, upon individual request, persons actively engaged in the operation of a one-man business.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of willfully filing false income tax returns for the years 1968-1970, in violation of 26 U.S.C. 7206(1). He was sentenced to concurrent two year terms of imprisonment, the first six months to be served in prison, and the remainder to be suspended, followed by two years' probation. The court also ordered petitioner to pay the federal income taxes due (Pet. App. B 11a-12a). The court of appeals affirmed (Pet. App. A 1a-10a).

The jury was selected pursuant to the district court's "Plan for Random Selection of Grand and Petit Jurors Pursuant to the Jury Selection and Service Act of 1968" (Pet. App. D 14a-25a). As required by that Act (28 U.S.C. 1863), the Plan was approved by a reviewing panel consisting of the members of the Judicial Council of the Circuit and the Chief Judge of the District. The Plan provides a method of random selection of names for inclusion in a master jury wheel (Pet. App. D 24a-25a).

The names are drawn from voter registration lists (supplemented by subsequent registrants to the latest practicable date) from all parishes within the district. Names are then drawn by random selection from the master jury wheel and qualification forms are sent to the persons selected. After the forms are returned, the names of those persons qualified for jury service and not exempt or excused from such service under the Plan are placed in a qualified jury wheel, from which grand and petit jury panels are selected (Pet. App. D 16a-21a).

In addition to exempting certain categories of persons from jury service and specifying other grounds upon which a person may be excused after he has been summoned for a panel, the Plan states (Pet. App. D 21a):

> EXCUSES ON INDIVIDUAL REQUESTS
>
> This Court, by unanimous agreement of all of its judges, hereby finds that jury service by members of the following occupational classes or groups of persons would entail undue hardship or extreme inconvenience to the members thereof, and the excuse of such members will not be inconsistent with the objects and purposes of the Act, and shall be granted upon individual request:
>
> (1) Persons actively engaged in the operation of a one-man business.
>
> (2) Mothers with children under ten years of age where there is no one but the mother to take care of the children.
>
> (3) Attorneys at law, doctors and dentists actively engaged in the practice of their profession, and ministers of the Gospel actively and regularly engaged in the discharge of their ministerial duties.

If a person actively engaged in the operation of a one-man business requests to be excused from jury service on the juror qualfication form, his name is not placed in the qualified jury wheel, and he will not be summoned for service on a grand or petit jury panel (Pet. App. D 23a).

In affirming petitioner's conviction, the court of appeals rejected his challenge to the district court's jury selection plan on the ground that it excused the operators of "one man" businesses from jury duty upon request (Pet. App. A 9a-10a).

ARGUMENT

1. Petitioner challenges the plan pursuant to which the jury was selected in his criminal trial because it permitted persons actively engaged in the operation of a one-man business to be excused from jury duty upon request. But the Jury Selection and Service Act of 1968, 28 U.S.C. 1863(b)(5), provides that a plan shall "specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service * * * if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title." The pertinent legislative history cites sole proprietors as a group which a plan may excuse upon individual request under this section of the Act. See S. Rep. No. 891, 90th Cong., 1st Sess., p. 28 (1967); H.R. Rep. No. 1076, 90th Cong., 2d Sess., p. 11 (1968). See also *United States* v. *Grey*, 355 F. Supp. 529, 531-532 (W.D. Okla.). Provisions in a jury selection plan for the excuse of such individuals are common. *United States* v. *Gurney*, 393 F. Supp. 688, 705 (M.D. Fla.) ("plans of at least thirty districts * * * provide for the granting of excuses to sole proprietors").

Contrary to petitioner's unsupported assertion, there is no basis to conclude that the excuse, upon request, of those persons actively engaged in the operation of a one-man business would significantly affect a defendant's "right to grand and petit juries selected at random from a fair cross section of the community" (28 U.S.C. 1861). The excuse, upon request of certain classes of persons, does not deny citizens the "opportunity to be considered for service on grand and petit juries" (28 U.S.C. 1861) or exclude them from such service "on account of race, color, religion, sex, national origin, or economic status" (28

U.S.C. 1862). The challenged provision of the plan provides the "play in the joints of the jury-selection process * * * necessary in order to accommodate the practical problems of judicial administration" permitted by the Act. *Hamling* v. *United States*, 418 U.S. 87, 138.

2. The jury selection plan complies with the Sixth Amendment to the Constitution. That provision's guarantee of an impartial jury requires a "presence of a fair cross section of the community" on the lists from which juries are drawn, which may not be achieved "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Taylor* v. *Louisiana*, 419 U.S. 522, 526, 530. The district court's plan does not automatically exclude persons actively engaged in the operation of a one-man business from the qualified jury list but only excuses them upon their request. Moreover, there is no evidence that the frequency with which operators of one-man businesses are thus excused from jury service impermissibly restricts the qualified jury wheel to only special groups in the community. Nor does it systematically eliminate "segments playing major roles in the community" (*Taylor* v. *Louisiana, supra*, 419 U.S. at 530) or "easily identifiable groups," which requires "the aid of the courts in securing equal treatment under the law" (*Hernandez* v. *Texas*, 347 U.S. 475, 478).

Indeed, it has long been recognized that classes may be excluded, not merely excused, from the jury pool "on the *bona fide* ground that it was for the good of the community that their regular work should not be interrupted," particularly when the "nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act." *Rawlins* v. *Georgia*, 201 U.S. 638, 640. See *Taylor* v. *Louisiana, supra*, 419 U.S. at 534; *Government of the Canal Zone* v. *Scott*, 502 F.2d 566,

569 (C.A. 5). Excusing from jury service potential jurors "for whom jury service would entail an undue financial hardship" is permissible even though as members of a class constituting "a very substantial portion of the community" they may not be "intentionally and systematically excluded" from the jury system. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 223, 224. The constitutionally mandated "fair-cross-section principle must have much leeway in application." *Taylor* v. *Louisiana, supra,* 419 U.S. at 538.

Thus, qualifications for jurors, exemptions, and excuses are not prohibited "so long as it may be fairly said that the jury lists or panels are representative of the community." *Taylor* v. *Louisiana, supra,* 419 U.S. at 538. The jury lists and panels in this case met that standard.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1976.